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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1397

CHARLES CATER,
Petitioner,

and

GULF AMERICAN FIRE AND CASUALTY COMPANY,
Petitioner,

versus

GORDON TRANSPORT, INC. and THE INSURANCE COMPANY OF NORTH AMERICA,
Respondents.

Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR AND ON BEHALF OF RESPONDENTS

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SUBJECT INDEX

	Page
ARGUMENT	1
THE APPLICABLE LAW	5
CONCLUSION	6

INDEX OF AUTHORITIES

Herron v. Maryland Casualty Company, 347 F. (2) 357 (CCA, 5th Cir., 1965)	5

OTHER

Federal Rules of Civil Procedure, Rule 50	5

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BRIEF FOR AND ON BEHALF OF RESPONDENTS

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

ARGUMENT

May It Please the Court:

Petitioners here limit their argument to the single contention that a statement in a pre-trial order that the respondent's

vehicle, was "involved" in the accident out of which petitioners' claims arose, is sufficient to send the case to the jury, without any other facts at all to show what that "involvement" might be.

Petitioner seeks here to rely on this one point although:

a. Respondents, in their original answer (Third Defense, Article 3) specifically denied striking or colliding with the plaintiff.

b. Respondents, in their original answer (Fourth Defense) specifically denied causing or contributing to the accident in any way.

In addition, reference to the same pre-trial order on which petitioners so strongly rely will show that respondents, in describing the expected testimony of their witnesses, consistently indicated that their truck did not collide with plaintiff or the pickboard. On the contrary the cable or cables supporting the pickboard **fell on top of** respondents' van. The photographs in evidence clearly show this. Additionally, plaintiffs' own witness, Mr. Cash, testified that the only broken cable that could be found after the accident **was on the opposite side of this five-lane thoroughfare from the site of the accident.**

Certainly petitioners were in no way misled by the statement made in the pre-trial order which admitted ownership of a vehicle "involved" in the accident. If they were, it is indeed odd that this was not even mentioned by counsel for petitioners in argument to the District Court.

Petitioners also contend that the Courts below failed to accord to the pre-trial order the weight and effect to which

it is entitled under Rule 16 of the Federal Rules of Civil Procedure. This is not correct. The Court of Appeals below has referred to and relied on this pre-trial order. The dispute arises from petitioners' attempt to read more into statements in that order than they contain.

In essence, petitioners contend that the District Court erred in granting a Directed Verdict on an issue of negligence. This presupposes, however, that there is any evidence upon which an issue of negligence can be based.

In this case there is no such evidence at all and the District Court and Court of Appeals both clearly recognized this. We do not here have a case in which the Court purported to consider conflicting evidence on the question of negligence and then decide the case. We are here concerned with a case in which there is no evidence at all, one way or the other, on how the accident even occurred, whether negligently or not.

There are in this record only photographs taken at the scene of this accident some short time after its occurrence as well as much later. Those photographs, taken shortly after the plaintiff fell, show only a Gordon's Transport truck stopped under the overpass in question, with a cable above the trailer and one end of the scaffold on the pavement some distance to the side of the truck and trailer.

Nothing at all shows when the truck arrived; whether it hit anything; or any other facts. As a matter of fact, accepting the plaintiff's testimony of where he was painting before he fell (R. 121-122 and Exhibit 14) and viewing the location of the truck and trailer in the photographs the only conclu-

sion that can be reached is that it was physically impossible for this truck to have struck either the scaffold on which plaintiff was allegedly working or the steel ladders on which it was suspended.

A lengthy colloquy between the Court and counsel for petitioners occurred prior to the granting of the Motion for Directed Verdict and can be found in the record at pages 225 through 247, inclusive. The context of this discussion is best exemplified by the following remarks (R. 227-228):

> "**The Court:** I realize that ordinarily granting a directed verdict is an unusual thing; but there must be some evidence that the defendant was guilty of negligence, and I would invite you to show me where the evidence is, because I don't know of a single solitary witness that has said that the driver of this truck did anything wrong.
>
> "**Mr. Hebert:** I repeat, your Honor, I believe the jury has a perfect right to infer that he was guilty of a lack of careful lookout by virtue of the fact that he struck it.
>
> "**The Court:** But there is no testimony that he struck it.
>
> "**Mr. Hebert:** There again I go back to these photographs, coupled with the testimony of Mr. Higgins, who states that he got a report of an accident, that he went down to that scene—
>
> "**The Court:** Couldn't the accident have occurred because one of the cables slipped off of the board?
>
> "**Mr. Hebert:** There is no evidence to that effect.
>
> "**The Court:** No, and there is none to the effect that he struck it."

The Gordon's Transport, Inc., truck was at the scene of the accident when the plaintiff fell from the scaffold or moments afterward. To this extent it was "involved" in the accident. Respondents do not deny this. However, this is the only connection between the Gordon's truck and this plaintiff.

Petitioners are completely incorrect in stating that there is any evidence at all to show that the truck collided with anything. To say that the driver of the Gordon's truck "hit" the scaffold or any part of it or the ladders and cables supporting it is completely without foundation or support in this record.

THE APPLICABLE LAW

Rule 50 of the Federal Rules of Civil Procedure authorizes the Motion for Directed Verdict at the close of the plaintiff's case, as was here done.

The law applicable to such motions is clear and has been the subject of much jurisprudence. It is felt unnecessary to cite authorities on this Rule.

Herron v. Maryland Casualty Company, 347 F. (2) 357 (CCA, 5th Cir., 1965), presented a case quite close in principle to the issues in this case. There, as here, an accident obviously occurred. There, as here, the vehicle blamed for the accident was admittedly present at the scene. And there, as here, there was absolutely no evidence to show negligence.

The Court of Appeals for the Fifth Circuit, in affirming the directed verdict entered by the District Court for the defendant at the close of the plaintiff's case, held:

"We agree with the District Court that the plaintiff has failed to prove that the truck driver negligently struck the caterpillar. In Louisiana, as elsewhere, the mere occurrence of an accident does not give rise to a presumption of negligence. In an action in tort in Louisiana the plaintiff has the burden to prove negligence as an affirmative fact. The mere statement of plaintiff's belief does not support a reasonable inference that the truck struck the tractor. Certainly the plaintiff has not supplied facts which show that the truck driver negligently struck the tractor."

CONCLUSION

In summary, respondents contend that there is nothing in this record to show that the Gordon's truck and trailer struck the scaffold, or any of its appurtenances. There is nothing in this record to show why this plaintiff fell to the pavement. There is nothing in this record which even bears on the question of the negligence or lack of negligence of the driver of the Gordon's truck.

The only evidence which may or could have any bearing on why this plaintiff fell is the fact that a cable (and it is not known if it was even supporting the scaffold) was found broken, on the day after the accident, and the broken end was on the opposite side of the wide boulevard from the side on which the Gordon's truck was being driven.

Respondents urge this Honorable Court that the verdict directed by the District Court and affirmed by the United

States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted:

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CERTIFICATE

I, the undersigned member of the Bar of this Honorable Court, do hereby certify that copies of the above and foregoing opposition to petition for certiorari have been served upon petitioners, Charles Carter and Gulf American Fire and Casualty Company, by depositing the same, postage prepaid, in the United States mails, addressed, respectively, to Samuel G. Gainsburgh, Esq., Robert G. Hebert, Esq., and James L. Selman, II, Esq., at New Orleans, La., on this ___ day of June, 1968.

Edward Donald Moseley